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# Measuring Access to Justice: The Quality of Outcomes

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## Abstract

*In this paper, we present a shortlist of criteria and questionnaire items that can be used to evaluate the quality of outcomes of legal procedures and other paths to justice. We define a path to justice as a commonly applied process that users address in order to cope with a legal problem. In our analysis such a path to justice begins when the user first addresses the process and ends at the moment of an outcome. This can be a final decision by a neutral, a joint agreement by the parties, or an end to the process because one of the parties quits the process. Our measurement instrument aims to assess the quality of this outcome from the perspective of the persons using paths to justice.*

*Criteria only are put on our shortlist if (a) they are regularly proposed in theoretical (normative) literature and (b) empirical research confirms that a substantial part of the population actually uses them to evaluate the outcomes of processes that give access to justice. We draw the criteria for our shortlist from the literature on theories of justice as diverse as distributive justice, restorative justice, corrective justice, retributive justice, transformative justice, legal pragmatism, and formal justice. The proposed criteria and items are intended to become part of a methodology for measuring the price and quality of access to justice from a user's perspective. The paper ends with a discussion of some of the (methodological) challenges: the problems associated with neutral evaluations of outcomes, the ambiguity of outcomes, and the relative weight of each criterion in different settings.*

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## I. Introduction

### A. *Criteria for the Quality of Outcomes*

In this paper, we present a shortlist of criteria that can be used to evaluate the quality of outcomes of paths to justice as experienced by users. We use this shortlist to develop items for a questionnaire that can be used to measure the quality of outcomes as experienced by users. This tool is intended for courts, ADR providers, NGOs, or others interested in the performance of procedures. With this tool, they can assess the quality and the costs associated with seeking access to justice.

We define a path to justice as a commonly applied process that users engage in, in order to cope with a legal problem. A legal problem is broadly defined as any situation in relation to other people that triggers a need for external norms or interventions. A path to justice begins when the user first starts the process and ends with an outcome on the moment of a final decision by a neutral, joint agreement of the parties, or an end to the process because one of the parties quits the process.

An outcome of a path to justice may thus, for example, be a decision by a court or an arbitrator in a conflict between employer and employee. It may also be the result of an application for a government decision, such as a birth certificate obtained after an application procedure with a governmental agency. It may also be a solution negotiated between a personal injury victim and the insurance company of the party that caused the injury. Measuring the quality of an outcome means assessing the quality of this situation.

The measuring instrument we are developing aims to evaluate access to justice from the perspective of the users. We thus look for criteria that reflect what people hope to find on a path to justice or are likely to be satisfied with, or what leads to other positive consequences for them. This is what social psychologists have called *social justice*. However, we take a broader perspective and also include other research traditions, such as legal theory, ethics, and fairness research conducted by economists.

Our methodology takes an external point of view. It is independent from what the suppliers of a path to justice aim to deliver. Courts, for instance, are likely to be bound by substantive law and aim to deliver outcomes that conform this. Such legal criteria for outcomes, though, are not always observed in practice, because settlements deviate from them or because courts fail to apply them correctly. Moreover, the clients of the system may experience legal criteria as unjust. So our goal is to evaluate the outcomes users obtain by asking them about their experiences. In a good-quality legal system, however, we may expect to find that legal rules, as well as the decisions of courts, come close to what the users of the legal system see and feel as just.

On the other hand, our methodology does more than just ask users of a procedure how satisfied they are with the outcome. We build on the theoretical and empirical literature that has established how people generally evaluate outcomes. We use the criteria that have been shown to reflect what people see as just or as other positive attributes of outcomes in situations where they have differences with other people.

There is not yet an established methodology for measuring the quality of outcomes of paths to justice. Colquitt (Colquitt, 2001) developed and validated a measure for four dimensions of organizational justice, including distributive justice, procedural justice, interpersonal justice, and informational justice. However, this measure does not include criteria such as retribution, restoration of harm, or the practicality of the outcome. Moreover, justice evaluations of processes within organizations may differ from the way paths to justice outside organizations are valued. Various authors have tried to integrate justice theories and suggested that criteria from different theories overlap (Cohen-Charash & Spector, 2001; Jasso, 2007; Konow, 2003; K. Törnblom, Jasso, & Vermunt,

2007; K. Y. Törnblom & Vermunt, 1999, 2007). To our knowledge, however, a comprehensive list with criteria for the quality of outcomes of paths to justice does not yet exist. The most comprehensive integration attempt to date has come from Törnblom and Vermunt, who brought procedural justice, distributive justice, retributive justice, and social resource theory under one umbrella (K. Y. Törnblom & Vermunt, 1999, 2007).

We obtain our shortlist of criteria in the following way. First, we investigate which criteria for the evaluation of outcomes are regularly proposed in the theoretical justice literature. We also include other literature relevant to the quality of outcomes in interpersonal interactions. As will be shown, however, justice theories are very encompassing. Most alternative criteria we found, such as efficiency or improving relationships, are also included in some theories of justice. Not every criterion ever proposed makes it to our list. It should be a criterion that is still upheld in theoretical writings, notwithstanding critical scrutiny.

Then we include empirical literature on justice (fairness) in our analysis. Empirical research shows that people have different “tastes for fairness” in different contexts. We collect research findings from several contexts, varying from workplace conflicts to evaluations of victim–offender programs and compliance rates regarding settlements or judgments in the area of personal injury. For our shortlist of criteria, we only select principles and criteria that a substantial proportion of the population actually uses to evaluate outcomes.

### *B. Approach*

Section II reflects the results of our literature review. We discuss the theories of justice that can be distinguished in literature. For each theory, we list the principles and criteria we found. Criteria only are put on our shortlist if (a) they are regularly proposed in theoretical (normative) literature and (b) empirical research confirms that a substantial part of the population actually uses them.

Principles of justice can be regarded as the most basic rules that, according to a certain theory of justice, should be operated in order to govern the world justly. These can be perceived as the reasons underlying a certain outcome, reasons that are justified by justice theories. An example of such a principle is the distributive principle of *equity* from equity theory. Principles often have to be translated into criteria for assessing outcomes. These criteria are the actual standards corresponding to justice principles whereby justice may be measured. For example, a criterion for outcome justice related to the principle of equity is that the distribution reflects the contribution to the issue of both parties. Most of the time, the theoretical literature already gives such criteria. Sometimes, we had to formulate them ourselves.

In Section III, we list the results of Section II. We present a table that gives an overview of the indicators and criteria we found that meet our conditions. Further, we present corresponding questionnaire items. These can be used for a quantitative measuring instrument for evaluating the quality of outcomes from a users’ perspective, as well as other tools to assess the quality of outcomes, such as focus groups or informal self-evaluations by suppliers of paths to justice. In Section IV, we conclude by summarizing our findings and discussing some methodological challenges.

This study is part of the R & D project “Measuring Access to Justice: The Hague Model of Access to Justice.”<sup>1</sup> The goal of this project is to develop a methodology for measuring the price and quality of access to justice (Barendrecht, Mulder, & Giesen, 2006; M. Gramatikov, 2007; M. Gramatikov, Barendrecht, & Verdonshot, 2008). The three basic elements of this methodology are tools for measuring the costs of access to justice (M. A.

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<sup>1</sup> Updated versions of the measurement instrument and methodology can be found on the wikispaces of the project at <http://www.measuringaccesstojustice.com>.

Gramatikov, 2008), the quality of procedures (Klaming & Giesen, 2008), and the quality of outcomes. Our study contributes to the development of a methodology for assessing the quality of outcomes of processes that give access to justice.

## II. Indicators and Criteria for Justice

This section presents a review of the existing literature. The following theories are included: distributive justice, restorative justice, corrective justice, retributive justice, transformative justice, informational justice, legal pragmatism, and formal justice. We first give a brief summary of the theoretical framework. Then we present the justice principles (indicators), the empirical data, and the criteria that meet our two conditions.<sup>2</sup>

### A. *Distributive Justice*

Distributive justice theories give an answer to the question how a society or a group should allocate its resources among individuals with competing needs or claims. Distributive justice has a vast tradition and was already discussed by Aristotle, who developed a theory based on proportionality (Konow, 2003). Issues regarding the just distribution of social resources are subject to the attention of many scholars in philosophy and social sciences (Cohen, 1986; Konow, 2003; Sabbagh, 2001; Thibaut & Walker, 1975). The focus of most studies is on determining principles for distributions people consider just. These include criteria that are used to ensure that each person is rendered what is due (Konow, 2001, 2003; Sabbagh, 2001).

Many competing views about distributive justice have been developed. These vary from theories considering the allocation of resources in society as a whole to allocation among individuals who act in different social contexts (Konow, 2001, 2003; Sabbagh, 2001). Furthermore, some theories focus on a single and universal justice principle, whereas others specify multiple, independent justice principles (Konow, 2001; Wagstaff, 1994). For the purpose of this paper, the three theoretical categories proposed by Konow (Konow, 2003) are used in order to describe the distinct theories of distributive justice.<sup>3</sup> These three categories include equality and need perspectives, utilitarianism and welfare economics, and equity perspectives.

Equality and need perspectives focus on concerns for those in a society who are least advantaged. This category includes egalitarianism, Rawls's theory of justice, and Marxism. Egalitarianism propagates equality of outcomes, which refers to the belief that resources should be allocated equally for all people. Thus according to this principle, an outcome is perceived as fair when the input or needs of recipients are disregarded in the decision-making process. Equality was found to be favored in cooperative relationships (Deutsch, 1985).

The need perspective emphasizes that resources should be allocated according to people's needs (Deutsch, 1975, 1985; Mannix, Neale, & Northcraft, 1995). According to this view, an outcome is perceived as just if the needs of individuals are taken into account when deriving the outcome. The need principle emerged from Marxism and Rawls's theory of justice. According to the first view, the needs of people play the main role in any allocation of goods, and what the members of a society receive should be determined by their needs instead of their abilities (Konow, 2003). In his theory of justice, Rawls (Rawls, 1971) emphasized that goods should be allocated equally among the members of the society, unless the needs of the least advantaged people require an unequal distribution. Research on the needs principle has found inconsistent results (Frohlich, Oppenheimer, & Eavey, 1987; Lamm & Schwinger, 1980). It has been argued that the difference principle and the need rule are less favored by members of society.

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<sup>2</sup> The terms *justice principle* and *indicator* are used interchangeably throughout the paper.

<sup>3</sup> Konow (2003) proposes that there are four theoretical categories in which justice theories can be placed. The fourth category, context, discussed views about the context-dependency of justice principles. This category does not generate distributive justice principles and is therefore not included here.

Insights from social psychology research have demonstrated that when people intend to maximize their own profits, they damage the group as a whole in the long run, which is generally why people seem not to disadvantage the group to which they belong. Given this finding, it seems logical that most people favor other distributive rules over the difference and needs principle or, differently put, that the context plays an important role in explaining which distributive principles are used when determining a just outcome.

Adams (Adams, 1965) argued that the outcome an individual receives should reflect his efforts. Moreover, in order to determine whether the outcome one receives is fair, an individual should compare his or her own outcome-to-input ratio to that of a comparative other. This is known as equity theory (Adams, 1965). Input can be defined in terms of effort, social and economic capital, know-how, and other forms of contribution. Moreover, both contributions that have a positive (profit) and a negative (losses, damages) impact can be relevant. Other researchers have described this theory as a normative rule that determines the allocation of resources according to the recipients' contributions and as proportionality between the individual's outcome and his or her inputs or contributions (Deutsch, 1985; Leventhal, 1976). Hence, according to equity theory, justice is achieved when the proportionality between outcome and input is equal for all individuals or parties involved. In addition, it has been proposed that people always try to maximize their outcomes and minimize their inputs (Walster, Berscheid, & Walster, 1973). Moreover, it has been stated that inequity causes distress and consequently results in attempts to restore equity (Walster et al., 1973). Empirical research has demonstrated that perceived distributive injustice results in emotional distress, which may have several behavioral consequences, for example, appealing the decision that has been made ((Mikula, Scherer, & Athenstaedt, 1998; Walster et al., 1973).

A distributive justice principle that has also been mentioned within the context of equity theory concerns the accountability principle (Konow, 2001). It can be considered a more sophisticated version of the equity principle. Whereas the principle of equity does not differentiate, per se, according to the nature of the contribution, the accountability principle does. Konow (Konow, 2001) distinguishes discretionary from exogenous variables. Discretionary variables affect output and can be influenced, whereas exogenous variables are variables that cannot reasonably be influenced but nevertheless affect output. Konow (Konow, 2001) gives the example of work effort for the first and a congenital condition such as missing a hand since birth for the second. Therefore, according to this principle, the distribution of resources should be proportional to volitional contributions. In addition to the accountability principle, the efficiency rule has been formulated. While the accountability principle refers to the relative size of distributions, the efficiency principle deals with the absolute size of distributions. More specifically, the efficiency principle states that allocations should be maximized (Konow, 2001, 2003).

It has been argued that the context determines which of these distributive rules — equity, equality, and need — is used in order to determine a fair outcome (Deutsch, 1985; Konow, 2003). Equity seems to be favored in competitive relationships, whereas equality seems to be favored in cooperative relationships (Konow, 2003). The following table summarizes the distinct criteria of distributive justice:

| <b>Indicator</b> | <b>Criterion</b>  |
|------------------|---|
| Equity           | The outcome is proportionate to the contribution.             |
| Equality         | The distribution gives both parties an equal share.           |
| Need             | The distribution is proportionate to both party's needs.      |
| Accountability   | The distribution is proportionate to volitional contribution. |



|            |  |
|------------|--|
| Efficiency | The distribution maximizes the welfare of the parties. |
|------------|--|

*B. Restorative Justice*

Restorative justice is a relatively new theory within the fields of victimology and criminology. It is an alternative to traditional criminal justice perspectives that focus on retribution. The emphasis of restorative justice lies on reparation of the harm caused or revealed by the offender. Restorative justice procedures require the participation of the victim, the offender, and the community.

Restorative justice has its roots in criminal justice, and therefore the vast majority of theoretical and empirical research has focused on the criminal justice system (Braithwaite, 2002; Gromet & Darley, 2006; Latimer, Dowden, & Muise, 2001; Marshall, 2003; Menkel-Meadow, 2007). As Roche (Roche, 2006) noted, “the widespread, and court sanctioned use of mediation to settle civil litigation can also be seen as an important example of restorative justice.” Considering the needs of victims of personal injury, principles of restorative justice seem to be useful in order to meet those needs and enhance feelings of fairness. Restorative justice principles have also been applied both theoretically and practically to human rights violations and international law (Menkel-Meadow, 2007; Roche, 2006). Hence, while the majority of research on restorative justice comes from the criminal setting, its principles may also apply to other contexts.

The aims of restorative justice are threefold (Gromet & Darley, 2006; Marshall, 2003; Strickland, 2004). First, it aims at providing restitution to victims by considering and repairing the emotional and material harms that have been caused by the offense. Second, restorative justice aims at increasing the offender’s compliance with the law in the future. This can be achieved if offenders realize and accept the consequences of the harm that they caused the victim. The third aim of restorative justice concerns the harm caused to the community and an effort to repair the relationships between the criminal offender and the community by reintegrating the offender. By taking both the victim and the offender into consideration, the idea behind restorative justice is to provide something positive to both parties.

It has been argued that restorative justice contributes to an increased satisfaction with procedures and outcomes for both the victim and the offender (Gromet & Darley, 2006; Marshall, 2003). The benefits of restorative justice are including victims and the community in procedures, as well as treating offenders with more respect than in traditional criminal justice procedures. This has been related to the principles of procedural justice (E.A. Lind & T.R. Tyler, 1988). People who feel that they have been treated fairly are more likely to be satisfied, which in turn results in an increased compliance with decisions. Restorative justice may therefore be of additional value to traditional criminal procedures, which primarily intend to achieve the establishment of accountability by punishing the offender. The benefit for victims is the consideration of their needs, which are neglected by the traditional criminal justice system. Restorative justice procedures give victims the opportunity to express their feelings and explain the consequences of the harm that has been caused. Considering the needs of victims increases their empowerment, as it directly involves them in the administration of justice. A further advantage of restorative justice for victims lies in its potential to increase transparency of criminal justice procedures, as their involvement leads to an increased understanding of the criminal justice system and procedures. Research has demonstrated that restorative justice programs contribute to increased victims’ satisfaction with procedures and outcomes (Gromet & Darley, 2006; Latimer et al., 2001). Besides fair treatment, the benefit of restorative justice for offenders includes the focus on reintegration into society. Traditional criminal procedures only marginally if at all achieve reintegration of criminals into society and reduction of recidivism (Gromet & Darley, 2006; Marshall, 2003; Menkel-Meadow, 2007). Proponents of restorative justice believe that focusing on reintegration of the offender into society by means of the distinct

techniques of restorative justice, in contrast to relying on punishment, reduces recidivism rates (Zehr & Mika, 1998). Tyler (T.R. Tyler, 2006) argued that increasing the motivation of people to obey the law can be achieved by involving people in fair procedures that enhance their internal motivation to obey rules. From the perspective of the offender, the goal of restorative justice is to enhance the acceptance of responsibility for the harm inflicted on the victim, which is believed to increase the perpetrator's motivation to comply with the law in the future (Braithwaite, 2002; T.R. Tyler, 2006). Although there is an ongoing debate as to the effectiveness of restorative justice programs, research has demonstrated that it succeeds in decreasing recidivism (Latimer et al., 2001).

The practice of restorative justice embraces a variety of different practices, including apologies, restitution, and acknowledgement of harm and injury, as well as other efforts to provide healing and reintegration of offenders into their communities, with or without additional punishment (Menkel-Meadow, 2007). Specific techniques include victim-offender reconciliation, victim impact statements, and community conferencing (Strickland, 2004).

To summarize, the central premise of restorative justice is that victims, offenders, and the community are all key stakeholders in the process. The three major goals that have been identified in the literature can be translated into two restorative justice principles, that is, criteria that people consider just. These criteria include the role of the community in achieving the aims of restorative justice.

| Indicator                    | Criterion   |
|------------------------------|---|
| Restoration/repairation      | Emotional and material harms have been repaired.<br>The offender acknowledges that he or she has done harm and accepted responsibility for his or her behavior.<br>The offender accepts the decision.<br>The offender complies with the decision. |
| Reconciliation/reintegration | The offender is reintegrated into the community.<br>The probability of the offender's future compliance with the law is increased.  |

### *C. Corrective Justice*

Corrective justice theory is based on the Aristotelian idea that when one person has been wrongfully injured by another, the injurer must make the injured party whole (Aristotle, 1985). Corrective justice is widely supported by philosophers of justice. It is also reflected in the sanctions provided by the legal system. The remedies for breach of contract and for torts usually include compensation in the form of damages. Damages are usually calculated as the value of the injured goods, as the costs of remedying the situation, or as making up for lost profits. Corrective justice is also reflected in the legal system where it provides for restitution (Smith, 2001; Virgo, 1999).

Corrective justice attempts to undo illegitimate losses and gains through bilateral and direct vindication. If there has been a wrongful transaction, corrective justice requires that the initial equality of the two parties be restored. It requires those who cause losses by acting in wrongful ways to repair, correct, or annul such losses (Weinrib, 1994, 2000). In particular, it requires that the wrongful act of one person be matched by the unjust loss of the other person (Weinrib, 1995). This matching can cause tensions within the legal system because sometimes a small wrong (negligence) leads to a big loss.

Corrective justice is clearly linked to restorative justice because it also concentrates on repairing harm. Most writers assume that restorative justice is broader than corrective (compensatory) justice because restorative justice goes beyond restitution and repairing

of harm in that it also restores value consensus and may even include elements of punishment to that effect (M. Wenzel, Okimoto, Feather, & Platow, 2007).

There can be little doubt that corrective justice is an important way of thinking about just outcomes, but there has been far less research done on corrective justice than on restorative justice. What has been established, however, is that people find correction (or compensation) appropriate in cases of careless conduct causing damages (Darley & Pittman, 2003; Enzle & Hawkins, 1992). Some degree of negligence is necessary in order for people to find compensation appropriate. Merely accidental harm is not a sufficient basis for compensation (Darley & Pittman, 2003). Attributions of responsibility for accidental harm suffer from outcome bias, however. The more severe the outcome, the easier respondents assume negligent conduct (Mazzocco, Alicke, & Davis, 2004).

| Indicator  | Criterion                              |
|------------|--|
| Correction | Losses and gains caused are corrected. |

#### *D. Retributive Justice*

Retributive justice is described as the oldest, most basic, and most pervasive justice reaction associated with human life (Vidmar, 2001). The key idea is that a sense of justice demands infliction of loss and pain on the aggressor proportionate to that inflicted on the victim. Retributive justice may be described as the idea of seeking to balance an injustice by rectifying the situation or by regaining an equality that the injustice had overturned.

Retributive justice is thus related to the concept of corrective justice. The most important difference between these dimensions pointed out in literature is that retributive justice focuses more on punishment of the wrongdoer, whereas corrective justice focuses more on what is needed to restore the status quo ante (Coleman, 2003; Sanders & Hamilton, 2001).

Empirical evidence shows that retributive justice, or just deserts, is the main motive for sentencing in the United States. It trumps incapacitation or deterrence of future crimes as motives for sentencing (Carlsmith, Darley, & Robinson, 2002). In other (more collectivist) cultures, this may be different, and respondents are more inclined to use other motives for punishment or sentencing (Darley & Pittman, 2003; Hamilton & Sanders, 1988; Na & Loftus, 1998).

If the actor can be accused of recklessness, the number of respondents who require punishment was found to increase. This increase is bigger than the increase when the attribution changes from recklessness to intent, suggesting that the boundary between negligence and recklessness is the main threshold that has to be passed between (mere) corrective justice to retributive justice (Robinsons & Darley, 1995). The reckless person is either (a) conscious of the risks he is running but chooses to run them, (b) runs the risk of causing greater harms than are risked in cases of ordinary negligence, or (c) both (Darley & Pittman, 2003). To give an example for this, Karlovac and Darley (Karlovac & Darley, 1988) found that about 50% of perceivers assigned some prison time for the offender, as well as compensation to the victim, when the harm-doer parked a truck on a hill above a children's playground and took what perceivers saw as too few precautions against the truck rolling downhill, even if the truck only harmed a piece of property. When only property damage was risked by parking the truck, compensation and a fine were seen as sufficient. This study demonstrates the importance of recklessness and intent, as well as the risks involved in the attribution of blame and responsibility and, hence, what people consider a fair outcome.

What triggers the size of the retribution? The more serious the harm, the more harsh the sanction. Although people vary as to their preferences for the size of sanctions, there is remarkable consistency in how people rate the comparative seriousness of crimes

(Darley & Pittman, 2003). The motives (recklessness, intent) of the perpetrator are also important determinants of the size of the retribution (Darley & Pittman, 2003). People would consistently lower prison sentences for offenders who successfully completed restorative conferences. If offenders fail to successfully complete a restorative conference, the sentence would not be increased (Gromet & Darley, 2006).

| Indicator   | Criterion  |
|-------------|--|
| Just desert | The offender was punished in a way proportionate to the wrongful action. |

#### *E. Transformative Justice*

Transformative justice may be regarded as a philosophical strategy to respond to conflicts and is also referred to as peacemaking. Its goals are reconciliation and deterrence, learning to live with one another, and continuing to do so in the future (Daly, 2002). The basic idea behind transformative justice is similar to the idea behind restorative justice. However, whereas restorative justice primarily focuses on the criminal justice system, transformative justice has a broader scope. It takes the principles underlying restorative justice beyond the criminal justice system.

From a transformative perspective, conflict resolution is less about the application of techniques or models for managing conflict than a search for processes that can make possible myriad transformations of self, self-in-relationships, self-in-society, as well as transformations in the structural realm (Fetherston & Kelly, 2007). It focuses on a fundamental transformation of underlying problems. Transformative justice is concerned with transforming relationships between disputants by focusing on root causes.

Conflict is regarded as a transformative relational and educational opportunity for the parties involved. Disputes are framed in terms of violations of relationships rather than in substantive terms. The central aspect of transformative justice is to bring individuals together in a process that encourages growth and development. It is concerned with dealing with the past in the present. A desired future situation is defined, after which the steps that are needed to get there are clarified. The focus is put on interests, not entitlements and claims. In the view of transformative justice, it is important that parties are enabled to frame issues and affect outcomes according to their particular interests (Law Commission of Canada, 1999). Also, the community plays an important role in supporting the contact between parties.

Few empirical studies specifically testing principles of transformative justice are available. However, as previously stated, transformative justice builds on restorative justice, a thoroughly studied area. As far as it concerns the emphasis on interests and communication between parties, empirical evidence can be found in studies relating to integrative methods of negotiation. Generally, research analyzing integrative methods of negotiation demonstrate that sharing information about interests is essential in obtaining an outcome that both parties are likely to view as fair.

| Indicator      | Criterion  |
|----------------|--|
| Transformation | The conflict was reframed in terms of relationships.<br>Individuals are brought in a process that encourages growth and development.<br>The outcome reflects the interests of the parties. |

#### *F. Informational Justice*

Over the past decades there has been a tremendous amount of theoretical and empirical research on procedural justice, which refers to aspects that a procedure should meet in order to be perceived as fair (K. Bos, van den, Wilke, & Lind, 1998; K. v. d. Bos,

Vermunt, & Wilke, 1997; E. A. Lind & T. R. Tyler, 1988; Thibaut & Walker, 1975; T. R. Tyler, 1984; T. R. Tyler, 1996). One of these aspects also refers to outcome justice. Research has demonstrated that people are more satisfied with an outcome and are more likely to comply with it when they receive an explanation or justification about the outcome (Bies & Shapiro, 1987; K. Bos, van den et al., 1998; Shapiro, Buttner, & Barry, 1994; Wenzel, 2006). This facet of justice has been referred to as informational justice. Explanations should convey information about both procedures and outcomes. With regard to the quality of outcomes, an adequate justification enables people to better understand why a certain decision was made and why they received a certain outcome.

An explanation about the outcome may be of particular importance when the outcome is perceived as unfair. If people perceive their outcome as unfair, they are likely to search for information that helps them to determine why they received an unfair outcome. In the absence of an explanation, they are likely to base their evaluation on information that is available to them. This typically includes information about the procedure or the decision-maker. Hence, it might, for example, be inferred that the outcome was based on inaccurate information or that the decision maker was biased, while this claim may objectively be invalid. Explanations influence fairness perceptions because they may convey the impression that a decision has been based on accurate information and that the authority has acted in an unbiased, consistent, and reasonable way. If no explanations are provided, a person may infer that a certain decision was obtained in order to intentionally disadvantage him or her (Bies & Shapiro, 1987).

Acceptance of and compliance with an outcome can be increased by providing a thorough explanation about the outcome. Research has demonstrated, for example, that people's feelings of inequity after receiving an inequitable outcome could be reduced by providing them with a causal account. Moreover, people's behavioral reactions were found to be influenced when they were provided with an explanation about why they received an inequitable outcome (Greenberg, 1993; Shapiro et al., 1994). In particular, information about and transparency of the outcome are therefore believed to be important aspects of the quality of an outcome.

| Indicator     | Criterion  |
|---------------|--|
| Justification | The parties received a thorough explanation about their outcome. |

### *G. Legal Pragmatism*

The next perspective does not focus on a theory of truth or a theory of meaning. Rather, legal pragmatism focuses on the practical consequences of legal theory. It looks at problems concretely and bases action on facts and consequences. It rejects moral, legal, and political theory when it comes to guiding legal decision making (Posner, 2003). Legal problems should be solved by using every tool that comes to hand, for instance, precedent, tradition, legal texts, and social policy (Farber, 1988). In this sense, it can be described as an eclectic, results-oriented antiformalism (Luban, 1996).

Advocates of legal pragmatism strongly diverge from one another, and legal pragmatism has been described as a "desperately confusing scholarly mare's nest" (Haack, 2005). This can be explained by the fact that it does not depart from a set of principles for justice. Rather, it is composed of a core set of claims, emphasizing instrumental reasoning, eclectic perspectives, foundationless inquiry, and attention to context (Butler, 2002). In the view of legal pragmatism, law is contextual. The emphasis should be put on a particular and concrete context, not on philosophical abstractions. Further, legal pragmatism is antifoundationalist. This means that it rejects the idea that correct outcomes can be deduced from some overarching principle or set of principles (Cotter, 1996). Furthermore, no central or finished set of legal materials exists that ensures a proper decision every time. Also, the consequences of interpretations and outcomes

should be carefully considered. It emphasizes a need to consider the question of what the possible societal results of a certain decision are. Finally, legal pragmatism can be said to be perspectivistic. In order to safeguard reasonableness, a judge must take all available perspectives into consideration.

Several different studies of judicial decision making and the court system support the descriptive claims of legal pragmatism (Butler, 2002). Also, the practice of alternative dispute resolution indicates that the central tenets of legal pragmatism truthfully describe aspects that people actually value.

| <b>Indicator</b>    | <b>Criterion</b>  |
|---------------------|---|
| Contextualism       | The outcome took the concrete circumstances into account.                             |
| Antifoundationalism | The outcome was pragmatic.  |
| Instrumentalism     | The consequences of the outcome were taken into account.                              |
| Perspectivism       | All practically relevant arguments were taken into account when deriving the outcome. |

#### *H. Formal Justice*

The last form of justice we take into consideration is formal justice. According to some, justice can be known and done only through the maintenance and equal application of general rules of law (Rawls, 1971). What is right or just for one case must also be right or just for all relevantly similar cases (Carr, 1981). Adjudicative bodies should reason by analogy and treat like cases alike (Jacobson, 1996).

According to this perspective, justice is made impersonal by narrowing the range of discretion of decision makers. The likeness is concerned with actions and situations, not with the type of people. Further, legal commands, such as outcomes, must be public and sufficiently clear so that those addressed by it are capable of complying with them. Furthermore, there must be a procedure for establishing the facts necessary to the application of the command (Posner, 1990; Rawls, 1971).

Formal justice is essential to the concept of rule of law. Its essence is nonarbitrariness, and it is a logical requirement of rationality (Kolm, 1996). Equal treatment is an ideal towards which civilized legal systems can generally be seen moving (Tebbit, 2005) Equality before the law is part of many constitutions. It is easy to find empirical evidence for the principle of formal justice (Konow, 2003). The principle seems uncontested in literature. Also, empirical studies show that people compare their outcomes with the outcomes of comparable others when evaluating the fairness of outcomes. This evaluation has strong effects on the perceived fairness of the outcome (Novemsky & Schweitzer, 2004).

| <b>Indicator</b> | <b>Criterion</b>   |
|------------------|--|
| Formal equality  | The outcome and the outcome of others are transparent in such a way that they can be compared in terms of equal treatment.<br>The outcome is similar to outcomes in similar cases.<br>The outcome is in accordance with the criteria that determine what are relevant similarities and differences with other cases. |
| Publicity        | The rules that applied to the case were public.<br>The rules that applied to the case were understandable.   |

### III. Shortlist of Indicators, Criteria, and Items

In the preceding section, we made an inventory of all relevant indicators and corresponding criteria for evaluating outcomes of paths to justice. In this section, a shortlist is developed with items that can be included in the measurement tool designed to evaluate the quality of outcomes.

Indicators are included on the basis of two decision criteria. First, they had to be relevant with regard to the purpose of the research project, meaning that only those indicators that could be translated into a question that was relevant and meaningful in order to assess the quality of an outcome were considered. As previously mentioned, the measurement tool is supposed to include all indicators that are relevant for users to indicate the quality of the outcome they received. Not all indicators discussed in the previous sections can be translated into items that lead to valid answers of the respondents. For instance, the reintegration indicator from restorative justice theory can be used to derive several questions, one of which is to what extent the other party was reintegrated into the society. There is, however, no meaningful way for the respondents, whom this instrument is designed for, to provide a valid and reliable answer to this question. Therefore, only those indicators that are of added value to the purpose of the project and that resulted in meaningful questions are included in the measurement tool. In addition, some indicators are believed to be more indicative of the quality of the procedure but not the quality of the outcome. For example, one criterion of the restoration principle refers to the acknowledgement of the harm caused and the acceptance of responsibility. This criterion was determined to be part of the quality of the procedure rather than the quality of the outcome and is therefore not included in the shortlist here. It is, however, included in the measurement instrument. The shortlist presented below provides more information about the indicators, criteria, and items included in this instrument.

The second decision criterion deals with the overlap that was found between several indicators. Some of the indicators that have been discussed in the previous sections show a great deal of overlap. For instance, transformative justice states that outcomes should reflect the interests of the parties. A similar criterion is also found in the legal pragmatist approach. In order to prevent duplication, a list including all the indicators discussed above was created and analyzed in terms of resemblances between indicators. Subsequently, those indicators that showed overlap with one or more indicators were excluded. The indicators deemed to be overlapping can be found in the following table.

| <b>Indicators that were excluded</b>   | <b>Reason for exclusion</b>                 |
|--|---|
| Accountability: The distribution is proportionate to volitional contribution.                                      | Integrated in equity.                       |
| Efficiency: The distribution maximizes welfare of both parties.  | Not relevant/measurable.                    |
| Correction: Losses and gains caused are corrected.   | Integrated in item for equity.              |
| Just desert: The offender was punished in a way proportionate to the wrongful action.                              | Integrated in item for equity.              |
| Contextualism: The outcome took the concrete circumstances into account.   | Integrated in item for antifoundationalism. |
| Perspectivism: All practically relevant arguments were taken into account.   | Integrated in item for antifoundationalism. |
| Publicity: The rules that applied to the case were public. The rules that applied to the case were understandable. | Integrated in item for formal equality.     |

The shortlist presented below includes all the indicators and corresponding criteria that are included in the measurement tool. Items were developed in line with these indicators

and criteria. The items were phrased in such a way that they can be answered using a 5-point Likert scale. The terminology was adapted, as the purpose of the measurement instrument is to evaluate the quality of outcomes across various settings, such as a negotiated agreement about compensation of damages between a seller and a buyer of a car, the result of a process to obtain identity documents, or the outcome of a process part of a crime victim reparations program. For instance, terms like “offender” or “punishment” were avoided. Instead, more neutral terms like “other party” and “outcome” were used. When the measuring instrument is used in a specific context, the terminology should be adapted to the specific context if this makes the questions easier to understand for the respondent.

| <b>Justice type</b>  | <b>Indicator</b>        | <b>Criterion</b>   | <b>Item</b>  |
|----------------------|-------------------------|--|--|
| Distributive justice | Equity                  | The outcome is proportionate to the contribution of the parties. | <p>To what extent was the other party’s contribution to the problem taken into account in the outcome?</p> <p>To what extent was your contribution to the problem taken into account in the outcome?</p> <p>To what extent did the outcome consider the efforts the other party made to resolve the problem?</p> <p>To what extent did the outcome consider your efforts to resolve the outcome?</p> |
| Distributive justice | Equality                | The outcome gives both parties an equal share.                   | To what extent did you and the other party pay or receive an equal share in the outcome?   |
| Distributive justice | Need                    | The outcome considers the needs of the parties.                  | <p>To what extent were the other party’s needs considered in the outcome?</p> <p>To what extent were your needs considered in the outcome?</p>   |
| Restorative justice  | Restoration/repairation | Emotional and material harms have been repaired.                 | <p>To what extent were your monetary harms repaired as a result of the outcome?</p> <p>To what extent were your emotional harms repaired as a result of the outcome?</p>   |



|                        |                     |  |   |
|------------------------|---------------------|--|---|
| Restorative justice    | Reintegration       | The future compliance with the law of the other party is increased.  | To what extent was the outcome effective in ensuring that the other party will avoid similar behavior in the future?  |
| Transformative justice | Transformation      | The conflict was reframed in terms of relationships.<br><br>The outcome reflects the interests of the parties.             | To what extent did the outcome improve the damaged relationship with the other party that resulted from the problem?<br><br>To what extent was the outcome favorable for you?                           |
| Informational justice  | Justification       | The parties received a thorough explanation about their outcome.   | To what extent did you receive an explanation about the outcome from the neutral person?<br><br>To what extent were you satisfied with the explanation you received about the outcome?                  |
| Legal pragmatism       | Antifoundationalism | The outcome was pragmatic.   | To what extent did the outcome solve your problem?  |
| Legal pragmatism       | Instrumentalism     | The consequences of the outcome were taken into account.   | To what extent were the chances that the outcome would be enforced taken into account?<br><br>To what extent were you satisfied with the outcome?<br><br>To what extent did you find the outcome fair?  |
| Formal justice         | Formal equality     | The outcome and the outcome of others are transparent in such a way that they can be compared in terms of equal treatment. | To what extent was it possible for you to compare your outcome with the outcome in other similar cases?<br><br>To what extent was your outcome similar to the outcome of other people in similar cases? |

## IV. Discussion

As stated in the introduction, the purpose of the present paper was to derive indicators and criteria for the quality of outcomes from literature and to develop a shortlist of questionnaire items. This shortlist can be used as part of a methodology for measuring the quality of outcomes from the perspective of users. In this section, we discuss some of the challenges that lay ahead when criteria are to be translated into such a methodology.

### *A. Measuring Two Sides of Outcomes?*

Some indicators require an evaluation of the outcome as obtained by others than the complainant. In the perspective of outcomes that are proportionate to needs, for instance, the question is whether the outcome has to be related to the needs of each of the parties. This criterion suggests that a plaintiff should be asked whether the outcome is proportionate to his or her own needs, as well as to the needs of the other party. Principles of restorative justice require the future compliance with the law of the offender to be increased, so this requires that the victim forms an idea about what the offender is likely to do in the future.

There are several ways of dealing with the two-sidedness of some criteria. One option is to ask respondents to consider both sides of the evaluation: "Is the outcome in proportion to your needs and to the needs of the other party?" This way of surveying opinions on outcome quality induces respondents to take a neutral perspective. One downside of this could be that a lack of information about the needs of the other party may affect the reliability of the data. Moreover, imposing the neutral perspective may be unnatural because disputants are likely to have a partial view on what is fair or just.

These effects could be avoided by splitting these items into two. One item could measure perceptions of the extent to which the outcome reflects the party's own needs (interests, contribution, etc.), and a separate item could measure the perceptions of the extent to which the outcome reflects the needs (interests, contribution, etc.) of the other side. Yet another option would be to leave out entirely items relating to elements of the other side. The instrument could be limited to perceptions relating to the user's own side because that is what the user experiences directly, knows most about, and is likely to have the strongest feelings about. On the other hand, it may also be unrealistic to assume that a disputant only evaluates a procedure based on how he or she is treated and is not prepared to take into account whether the opponent is treated fairly.

To our knowledge, no theory relating to this issue is available yet. Both normative and empirical literature on justice often depart from a hypothetical situation that presupposes a veil of ignorance or the perspective of an impartial spectator. However, evaluating the quality of actual outcomes involves real people with real stakes. It may be difficult for people to take the perspective of the other party. People may not have sufficient information, or their perceptions may be subject to psychological effects like self-serving biases. Psychologists studying the somewhat related area of procedural justice commonly limit their studies to perceptions of treatment of a party and do not examine whether the opponent has been given voice, due respect, or sufficient information. Further research is needed to determine whether items that ask respondents to take into account elements that relate to the other party result into reliable data and whether they reflect how people actually evaluate outcomes.

### *B. Multiple Outcomes*

In some instances, a path to justice results in several different outcomes. A victim-offender mediation may lead to a result with elements such as an apology, an agreement about future conduct, and compensation for damages. Moreover, such a procedure takes place in the context of a criminal procedure that may result in punishment and possibly some form of treatment for the offender. What, then, is the outcome that the user of the procedure should be interviewed about?

Asking an overall assessment of all elements of the outcome is one option here. This is the most straightforward way of dealing with this issue. The assumption is that, one way or the other, respondents take all different elements of the outcome into account, at least the ones that they find most important and that have the greatest effect on their overall perceptions. However, it may be difficult for respondents to determine what the outcome exactly is and to develop a clear picture of all the different elements. Another option that could help to overcome this difficulty is to map out possible outcomes and present corresponding items to respondents. Additional knowledge about how clients of the justice system perceive outcomes, especially in complex situations, could help to determine which strategy to opt for.

### *C. Weighting of Criteria*

The criteria and items we have collected are all criteria that people use to evaluate outcomes. The method we used in this paper did not tell us what weight each criterion has in the perception of users of procedures. How important each criterion is will depend on the type of relationship (Konow, 2003). For instance, when people evaluate the quality of an outcome of a neighborhood dispute, they will probably use different criteria than when they evaluate the justness of a sanction for an intentional criminal act. When family members “divide the pie,” need is likely to be an important criterion, whereas equity, for example, rewarding an employee by compensating him or her for effort or contributions made to the business of the employer, is probably a more important criterion in a work-related conflict. Cultural and socioeconomic differences may also affect the relevance of the criteria. Empirical studies found evidence that people living in a more collectivistic culture may put more emphasis on equality, whereas members of a more individualistic culture may find equity more important (Konow, 2003).

The challenge is to account for these contextual differences in importance of the indicators while at the same time stick to one single list of items for measuring the quality of outcomes because an essential aim of the methodology is to compare paths to justice across contexts. Roughly speaking, two different strategies can be distinguished to address this weighting issue. A first strategy could be to let the weights of the different indicators be assigned by the respondents. For each single indicator or item, an item could be included that asks respondents to rate the importance of this item in the overall assessment of the quality of the outcome. Although this seems to be most consistent with a bottom-up users’ perspective, this presents obvious problems. This strategy would require a serious extension of the number of items included in the measuring instrument. Furthermore, it is unknown what the reliability of the data relating to importance will be. Answering these questions requires efforts on a very abstract level from respondents and assumes they will be able to determine the relative value of every single indicator relative to one another.

A second strategy could be to assign weights as part of the methodology itself. Weights could be derived using normative theories. Governments or other providers of paths to justice may put emphasis on specific justice principles. However, as stated earlier, we do not wish to participate in the discussion about what “Justice” should be but want to measure what users of procedures are likely to find important elements of quality. Testing which weights users of certain procedures attach to criteria and then integrating these weights into the methodology is another option. Obviously, further research is required to deal with this issue.

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